No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

v.

PREDRAG STEVIC,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE

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Interest of Amicus Curiae

The National Immigration Project of the National Lawyers Guild, Inc. is a non-profit organization of lawyers, legal and community workers dedicated to the protection of immigrants' rights in the United States. Since its inception in 1971, the National Immigration Project has taken special interest in the representation of applicants for political asylum. Project members throughout the country have provided accessible and zealous counsel to individual applicants. In addition, the Project has developed manuals on the practical aspects of asylum practice, asylum documentation materials, and skills seminars on refugees and asylees.

The National Immigration Project is particularly interested in the outcome of this case because the standard of proof in asylum

cases affects not only the practice of Project members, but also the lives of the clients for whom the Project exists. The National Immigration Project is pleased to have the twenty-two undersigned organizations (described in Appendix A) join in this brief to advocate the affirmance of the well-founded fear standard in keeping with the letter and spirit of the Refugee Act of 1980.

American Friends Service Committee, New England Regional Office
Asian American Legal Defense and Education Fund (AALDEF)
Asian Law Caucus, Inc.
Bay Area Immigrant and Refugee Rights Project
Center for Immigrants' Rights (CIR)
Central American Refugee Center (CARECEN)
Central American Refugee Defense Fund (CARDF)
Chicago Religious Task Force on Central America (CRTFCA)
El Rescate
El Salvador Lawyers Committee of Denver
Haitian Refugee Center (HRC)
Justice and Peace Office of the Archdiocese of Denver
La Raza Legal Alliance
Lutheran Immigration and Refugee Service of the Lutheran Council in the United States of America
Mexican American Legal Defense and Education Fund (MALDEF)
National Center for Immigrants' Rights, Inc.
National Ministries of the American Baptist Churches in the U.S.A.
Salvador Refugee Coalition of Denver
Tucson Ecumenical Council Task Force for Central America
Unitarian Universalist Service Committee (UUSC)
Washington Association of Churches
Willamette Valley Immigration Project

Summary of Argument

As presented to this Court, the issue is whether the Refugee Act of 1980, (the "Act"), Pub. L. No. 96-112, 94 Stat. 102 *et seq.*, lessened the burden of proof imposed upon an applicant for the withholding of deportation under §243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). The government argues that Congress intended no change in the burden of proof simply because the standard applied prior to the Act, i.e., that an applicant must prove a "clear probability" of persecution is equivalent to proof of a "well-founded fear" of persecution as required by the Act itself. Thus, the argument goes, the label which is pinned to the applicant's burden of proof is not important.

It is the purpose of this brief, however, to show that labels are important in this case, and that only the "well-founded fear" language adequately, clearly, and correctly describes the substance of the applicant's burden. The Solicitor General may understand that, *as interpreted in some cases*, there are no significant differences between a "clear probability" and a "well founded fear" of persecution. But that is not true of immigration officers who must administer this highly sensitive law on a day-to-day basis, who tend to think that a "clear probability" requires a level of proof distinctly more arduous than that called for by a "well-founded fear" of persecution, and who have been confused by a series of administrative decisions which seem to compel the applicant to prove everything from the prospect of actual persecution, to the "clear probability" of persecution, to a "realistic likelihood" of persecution, or that he or she would be "singled out" for persecution, or is the individual "target" of potential persecutors.

It is also the purpose of this brief, therefore, to ask the Court to disapprove of language such as "clear probability" as not being descriptive of the applicant's true burden of proof, and to provide a plain, easy to understand, easy to administer description of what the burden or proof really is. Such a description should be substantially as follows: The applicant must prove a fear of

persecution that is reasonable or realistic, meaning that the fear must be supported by some credible evidence. While mere conjecture is insufficient, it is asking too much for an applicant to prove that he or she "would be" persecuted or that persecution is more probable or more likely to occur than not. The life and death implications of an asylum application cannot be a matter of odds. Similarly, while it is appropriate to ask the applicant to prove a fear which is particularized, it is wrong to expect an applicant to prove that he or she would be "singled out" or is an individual "target" of persecutors, in the sense that persecutors are "looking for" the applicant individually.

The discussion which follows will show that the formulation proposed here flows from the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577. It is, therefore, the burden intended by the Refugee Act of 1980 because the Act was a manifestation of congressional intent to conform United States law with the U.N. Protocol. Moreover, the substance of the burden of proof advocated here is not inconsistent with any judicial opinion on the subject. It is inconsistent only with administrative formulations that would impose a burden so onerous that Congress could not have intended to adopt it either before or after the Refugee Act of 1980.

ARGUMENT

I. The Well-Founded Fear Standard of the United Nations Protocol Requires Nothing More Than Credible Evidence of a Reasonable Fear of Persecution.

The government correctly notes that the issue in this case "concerns the meaning of the phrase 'well-founded fear of persecution' in the Refugee Act of 1980." Brief for the Petitioner at 20. It also correctly acknowledges that because the Act was expressly intended to conform U.S. law to our international obligations under the U.N. Protocol, construction of the phrase "well founded fear of persecution" must begin with the construction placed on that phrase as it first appeared in the Protocol itself. Brief for the Petitioner at 22.

The intent of Congress to conform U.S. law to the U.N. Protocol could not be clearer.[1] Thus, when Congress enacted the Refugee Act of 1980, it amended Sec. 243(h), 8 U.S.C. 1253(h), to reflect the mandatory nature of the United States' obligations pursuant to Article 33 of the U.N. Protocol.[2] This amendment was deemed desirable, "for the sake of clarity" and "necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements." H. Rep. 96-608, p. 18 (1979). The amended language was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." Conf. Rep. on the Refugee Act of 1980, No. 96-781 p. 20 (1980).

Further, Congress eliminated the geographical and ideological restrictions previously applicable to conditional entrant refugees, former §203(a)(7), 8 U.S.C. 1153(a)(7), and provided a new non-discriminatory definition of the term refugee. Compare Article 1 of the U.N. Protocol with §101(a)(42), 8 U.S.C.

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[1] Of course, the United States had acceded to the Protocol in 1968 and, as a result, it might be assumed that asylum applicants in the United States were accorded the same rights guaranteed by the Protocol, even before the 1980 Act. Nevertheless, by enacting the Refugee Act of 1980, Congress obviously found a need to emphasize its intent to make the Protocol applicable to the United States.

The issue as to whether or not the U.N. Protocol is a self-executing treaty has never been clearly resolved. Cf. *Matter of Laurenzano, et al.*, 13 I&N Dec. 636, 639 (BIA 1970) (not self-executing); *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir. 1977) (no new rights or entitlements vested by operation of the Protocol); *Betrand* v. *Sava*, 684 F.2d 204, 218, 219 (2nd Cir. 1982) (not self-executing). *Orantes-Hernandez* v. *Smith*, 541 F.Supp. 351, 365 fn. 15 (C.D. CA 1982) (issue expressly left undecided by court); *Matter of Dunar*, 14 I&N Dec. 310, 313 (BIA 1973) (Protocol is self-executing); Leon Wilde "The Dilemma of the Refugee: His Standard for Relief" 1983, Cardozo Law Review 353-379 (Protocol is self-executing); see also *Ming* v. *Marks*, 367 F.Supp. 673, 677 (S.D. N.Y. 1973), *aff'd on opinion below*, 505 F.2d 1170, 1172 (2d Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 911, 95 S.Ct. 1564, 43 L.Ed.2d 776 (1975).

[2] The new mandatory language of §243(h) in the Refugee Act of 1980 removed the absolute discretion formerly vested with the Attorney General. See *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981). Cf. *Marroquin-Manriquez* v. *INS*, 699 F.2d 129, 133 fn. 5 (3rd Cir. 1983), *pet. for cert. pending*, No. 82-1649 (filed April 17, 1983).

1101(a)(42) of the Immigration and Nationality Act. This new definition "will finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee'." Conf. Rep. No. 96-781 p. 19 (1980). See also H. Rep. No. 96-608 pp. 9, 17 (1979), and S. Rep. No. 96-256 p. 4 (1979). Finally, the enlarged basis of persecution to include "nationality" and "membership in a particular social group" in both the new definition of refugee and withholding of deportation provision represented movement towards conformity with the U.N. Protocol.

Conformity with the U.N. Protocol being the intent of Congress, it only follows that the burden of proof imposed upon asylum or refugee applicants should be consistent with that intended by the Protocol. About the intent of the Protocol there can be little doubt. According to the drafters of that document,

> The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or *can show good reason why he fears persecution.* (emphasis added).[3]

More recently, the United Nations High Commissioner for Refugees (UNHCR)[4] characterized the burden of proof in the following way:

> 37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by

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[3] United Nations Economic and Social Committee, *Report of the Ad Hoc Committee on Statelessness and Related Problems* at 39 (Feb. 17, 1950) (E/1618; E/AC 32/5).

[4] The UNHCR is charged with the responsibility of supervising the application of the provisions of the U.N. Convention and Protocol relating to the Status of Refugees. See Article 35 of the 1951 U.N. Convention and Article II of the 1967 U.N. Protocol.

The UNHCR has published the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979). The BIA has accepted the *Handbook* as a significant source of guidance as to the meaning of the Protocol. *Matter of Rodriguez-Palma*, 17 I & N Dec. 465 (BIA 1980).

categories . . . by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin.

38. To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his rerfugee status, but that this frame of mind must be supported by an objective situation. *The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.* (emphasis added).

* * *

43. These considerations *need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.* The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g., a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded". (emphasis added).[5]

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[5] Paragraphs 37, 38 and 43 of the *U.N. Handbook*. See also paragraphs 39-42 of the *U.N. Handbook* and Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 66-67 (1981).

The *U.N. Handbook* is not cited here for the proposition that Congress was guided by it specifically when enacting the Refugee Act of 1980. Rather, it is cited only for the purpose of establishing what the U.N. itself says the burden of proof constitutes. Of course, each country may decide whether a particular applicant has sustained his or her burden. Brief of the Petitioner at 33. But this fact has no bearing on the substantive nature of the burden itself.

The Protocol's burden of proof, therefore, emphasizes the fear of the applicant and is satisfied if the applicant is able to prove by credible evidence that his fear of persecution is reasonable. The UNHCR indicates that the proper focus of an asylum examiner's inquiry should be on the reasonableness of the fear, not on a balancing of probabilities.[6] Since decisions on asylum have the potential for determining the life or death of a person, an asylum decision cannot be made to depend on the odds of persecution, especially in light of the difficulty a refugee has in producing tangible proof of future persecution.

Significantly, under U.N. interpretation, an applicant need not show that he has already personally attracted the attention of his country, nor demonstrate a likelihood that he will be "singled out" for persecution. Rather,

> What has happened to others in similar circumstances, for instance, may be sufficient evidence of a well-founded fear or persecution. . . a person who has not been persecuted simply because he has not yet attracted the attention of his government, need not wait until detection and persecution before he can claim refugee status. . . Moreover, a person *need not be singled out for persecution in order to be a refugee*. . . (emphasis added). Letter dated January, 1982 from the Washington Liaison Office, UNHCR, attached as Appendix B. (B-8, B-9)

Finally, both the Immigration and Naturalization Service (INS) and Department of State profess to follow the very same guide lines. Operations Instruction 208.4 of the INS provides:

> *Burden of Proof*
> The burden is on the asylum applicant to establish. . . a well-founded fear of persecution. . . This means that the applicant must have actually been persecuted, or can show *good reason why he/she fears persecution*. (emphasis added).

[6] See letter dated January, 1982 from the Washington Liaison Office of the UNHCR attached as Appendix B. (B-7 and B-10)

The State Department's "Refugee Processing Guidelines" (April 18, 1981) at p. 4 provides:

> The applicant need not establish that persecution occurred in the past or that persecution would actually occur if he returned to his home country. Rather, it is only necessary that the interviewer conclude that a fear of persecution exists and is well-founded.

Thus, proving a well-founded fear of persecution requires that an applicant demonstrate a reasonable basis to fear persecution. The reasonableness of the fear is evaluated by considering a totality of the circumstances, including the objective background situation in the country of origin, the subjective perceptions of the applicant, and the credibility of the applicant. An asylum applicant should not be required to prove that he will be persecuted or that persecution is more probable than not. It is enough if the applicant submits evidence, which fairly evaluated, would lead a reasonable person to believe that he might be persecuted, i.e., that persecution is reasonably possible.

If immigration officials were only interpreting their own "good reason" to fear instruction to mean what it plainly says, this case would present no controversy. Instead, they have come to think of "good reason" to fear as requiring a higher level of proof. As the discussion which follows will show, they have been misled in that respect by indiscriminate and confusing descriptions of the burden of proof found in decisions of the Board of Immigration Appeals.

II. Decisions of the Board of Immigration Appeals Imply That the "Clear Probability" Standard Is More Arduous Than the "Well-Founded Fear" Standard.

The Board of Immigration Appeals, which sets the standard for all immigration officials,[7] decided after the United States acceded to the U.N. Protocol in 1968, that the "clear probability" standard which had been imposed prior to acces-

[7] 8 C.F.R. 3.1(g) provides that "selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues."

sion amounted to the same thing as the "well-founded fear" standard of the Protocol. *Matter of Dunar*, 14 I.&N. Dec. 310 (BIA 1973).

As to the substantive nature of the burden, the Board said:

> Some sort of a showing must be made and this can ordinarily be done only by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted. The burden of coming forward with the requisite evidence is obviously the claimant's. And if all he can show is that there is a merely conjectural possibility of persecution, his fear can hardly be characterized as 'well-founded.' " 14 I.&N. Dec. at 319.

Taken in context, it seems apparent that when the Board spoke of proving a "realistic likelihood" of persecution, it used that term as the equivalent of a "well-founded fear" and did not mean to imply that an applicant must prove that persecution is more likely or more probable than not. Rather, in the Board's view, the applicant must prove, on the basis of credible evidence, that his or her fear of persecution is realistic or reasonable.

Unfortunately, the Board itself has not always followed its own precedent as established by *Dunar*. And, as will be noted more fully in the next section of this Brief, its failure to do so has led immigration officials to apply a standard which is in fact more arduous than the "realistic likelihood" or "well-founded fear" standard of *Dunar*.

For example, in *Matter of McMullen*, 17 I&N Dec. 542, *rev'd on other grounds*, *McMullen* v. *INS*, 658 F.2d 1312 (9th Cir. 1981), the Board totally abandoned references to proving either a "realistic likelihood" or a "well-founded fear" of persecution, but reverted instead to requiring proof of actual persecution or of a "clear probability" of persecution. Aside from the labels used by the Board, moreover, it is readily apparent from the facts of the case and the evidence offered by McMullen, that the Board

was not concerned at all by the realistic or reasonable nature of the fears which McMullen expressed. Instead, the Board demanded proof that McMullen would be targeted for retribution by the Provisional Irish Republican Army were he to be deported to England and that the British government could not protect him from such retribution. The "clear probability" standard, as employed by the Board in *McMullen*, was thus plainly more demanding than the "well-founded fear" standard of the Protocol as interpreted in *Dunar*.

In other cases also, the Board has called for proof of a clear probability of persecution rather than for proof only of a reasonable fear of persecution. Thus in *Matter of Ramirez-Rivero*, 18 I.&N. Dec. __, Interim Decision 2884 (BIA 1981), the Board declared that the applicant "must demonstrate a clear probability that he will be so persecuted if returned to his country." There is no reference to proof of a reasonable or realistic fear.

In *Matter of Portales*, 18 I.&N. Dec. __, Interim Decision 2905 (BIA 1982), the Board phrased the applicant's burden in the alternative; that is, the Board said an applicant "must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution." The obvious implication of phrasing the burden in alternatives is that one is different from the other. Yet the Board went on to analyze the evidence only in terms of whether the applicants "will be persecuted," not whether they had a realistic or reasonable fear of persecution.

In *Matter of Salim*, 18 I.&N. Dec. __, Interim Decision 2922 (BIA 1982), the Board phrased the burden somewhat differently when it declared "An applicant must present objective evidence that he has a well-founded fear that he is likely to be singled out for persecution...."

Finally, in *Matter of Sibrun*, 18 I.&N. Dec. __, Interim Decision 2932 (BIA 1982), the Board said an applicant

"must demonstrate a likelihood that he individually will be singled out and subjected to persecution."[8]

Of course, in some of the foregoing cases, the applicant's evidence would have been insufficient to prove even a reasonable fear and so the Board was not necessarily concerned with measuring the evidence against the reasonable fear standard. Nevetheless, the continual use by the Board of such phrases as "a clear probability" or "singling out" for persecution plainly implies in everyday usage that the applicant must prove something more than a reasonable or realistic fear of persecution.

A. *The Board's Requirement That an Applicant Show a Clear Probability That He Would Be "Singled Out" for Persecution Has Placed an Impermissibly Strenuous Gloss on Proving a Well-Founded Fear of Persecution.*

A standard which imposes upon the applicant a burden of proving more than a reasonable fear of persecution frustrates the intent of Congress which was to enact a humanitarian asylum law that would be administered in an evenhanded way and which was meant to give all asylum applicants a fair chance to prove their claims.

Compelling applicants to prove more than a reasonable or realistic fear of persecution is not fair because it makes their burden all but impossible to sustain in most cases. This is so bcause an applicant who is not well-known is simply not going to have evidence of being "singled out" for persecution in a particular country. Refugees do not carry such evidence with them when they flee a particular country and they do not have access to such evidence when they are in the United States.

[8] The Board has frequently cited *Cheng Kai Fu* v. *INS*, 386 F.2d 750 (2d Cir. 1967), *cert. den.* 390 U.S. 1003, for the proposition that an asylum applicant must prove that he would be "singled out" for persecution, as if potential persecutors are waiting to pounce on him. Actually, all *Cheng Kai Fu* stands for is the proposition that an asylum applicant's fear must be particularized as to him in the sense that his fear must be more specific than any generalized fears of the population at large.

The difficulty refugees fleeing persecution have in supporting their claims has been recognized by the UNHCR. The *U.N. Handbook* provides:

> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary proof, and cases in which an applicant can provide evidence of all his statements will be an exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

Congress was very concerned over the traditional politicized nature of the Executive practice in the asylum area.[9] Therefore, in order to control the Executive's use of political considerations, a non-discriminatory definition of refugee was adopted which, it was hoped, would result in fair and equal treatment for all asylum applicants. This has not proved to be the case in practice. For, as interpreted daily by immigration officers, the Board's "clear probability" standard sets the level of proof necessary so high that it allows the government to comfortably reject applicants to whom it does not wish to grant asylum for ideological or foreign policy reasons, thus re-introducing the double standard

[9] *Anker & Posner* (Note 5), See pp. 41, 46, 48, 63.

into asylum law which the new refugee definition sought to eliminate. This is candidly admitted in an internal study of asylum applications made by the INS itself.[10] As that study noted:

> In some cases, different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while others do not.
>
> For example, for an El Salvadoran national to receive a favorable asylum advisory opinion, he or she must have "a classic textbook case." On the other hand, BHRHA sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. This happened in December 1981 a week after martial law was declared in Poland. Seven Polish crewmen jumped ship and applied for asylum in Alaska. Even before seeing the asylum applications, a State Department official said, "We're going to approve them". All the applications, in the view of INS senior officials, were extremely weak. In one instance, the crewman said the reason he feared returning to Poland was that he once attended a Solidarity rally (he was one of the more than 100,000 participants at the rally). The crewman had never been a member of Solidarity, never participated in any political activity, etc. His claim was approved within forty-eight hours.
>
> Although the Refugee Act abolished the country of national origin test for refugee/asylee status, for foreign policy or other reasons the criterion may still be overriding. It is unclear, however, what the statutory basis for such a determination is.

INS Asylum Study, p. 59.

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[10] *See* "Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service" INS, Wash. D.C., June & December, 1982 ("INS Asylum Study"). Excerpts of this 93-page report have been introduced into the Congressional Record by Senator Edward Kennedy and have appeared in the press. See Cong. Rec. May 4, 1983, p. 56035, and *The Boston Globe*, p. 2, May 9, 1983.

As a result, in cases which the government chooses to oppose, an applicant who may have a bona fide fear of persecution is left with an almost insurmountable burden of producing highly individualized evidence which is often simply not available.

On the other hand, the government admits refugees on a wholesale basis from communist countries, with the exception of Yugoslavia,[11] without ever demanding such proof,[12] thus transforming a facially neutral law into an instrument of foreign policy. Contrary to the intent of Congress,[13] this policy has had particularly devastating effects for refugees fleeing totalitarian governments which may be political "friends" of the United States.

Simply put, the Board's requirement that an applicant show a clear probability that he would be singled out for persecution by his governement has placed an impermissibly strenuous gloss on proving a "well-founded fear" of persecution. It has led the INS to require an applicant to prove that he is the "target" of government persecution. See *Almirol* v. *INS*, 550 F.Supp. 253, 256 (N.D. CA 1982). This is an unfair and onerous burden to ask of a person seeking asylum and as such, frustrates the intent of Congress.

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[11] Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. Rev. of L. And Soc. Change 107, 108, 124 (1978).

[12] David A. Martin, "The Refugee Act of 1980: Its Past and Future," *1982 Michigan Yearbook of International Legal Studies* (New York: Clark Boardman Company, Ltd., 1982), p. 112.

[13] "[T]he Committee intends to emphasize that the plight of the refugees themselves, as opposed to the national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States." H. Rep. No. 96-608, p. 13 (1979).

See also, *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*. 96th Cong., 1st Sess. 21 (1979) (remarks of Dick Clark, U.S. Coordinator for Refugee Affairs and Ambassador-at-Large) (passage of the Refugee Act "would make all people—regardless of their ideology, regardless of their geography—eligible for the [refugee] program"); S. Rep. No. 96-256, p. 1 (1979); H.R. Rep. No. 96-608, p. 13 (1979); 125 Cong. Rec. 23240 (1979) (remarks of Sen. Boschwitz) ("[i]f our commitment to help desperate, homeless people is sincere, we must be willing to help all in need of assistance despite their ideologies or countries of origin").

B. *Judicial Decisions Do Not Support the Board's Interpretation of the "Clear Probability" Standard.*

At the time Congress was considering the Refugee Act of 1980, the administrative and judicial decisions indicated that the substance of an applicant's burden was the same whether described as a "clear probability" or a "well-founded fear" of persecution. See *Kashani* v. *INS*, 547 F.2d 376 (7th Cir. 1977); *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973). It is therefore not surprising that according to the Refugee Act's legislative history: "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. No. 96-256, p. 9 (1979). Nevertheless, the substance of the standard has rarely been discussed by the courts.

One exception is *Kashani* v. *INS*, 547 F.2d 376 (7th Cir. 1977), where the court rejected Kashani's assertion of a fear of persecution in Iran because he had submitted no objective evidence whatsoever. The court held that the "clear probability" standard of §243(h) and the "well-founded fear" standard of Article 33 of the U.N. Protocol were, in effect, equivalent because under both laws, the burden is on the applicant to come forward with some objective evidence to substantiate his asserted fear and elevate his claim from the realm of mere conjecture. 547 F.2d at 379. In fact, the court founded its standard on the Ad Hoc U.N. Report previously cited at fn. 3 of this brief. The court found no need to discuss the burden of proof further because Kashani's claim was based only on mere conjecture.

Other courts have muddied the waters somewhat by simply labeling the applicant's burden in various ways without further explanation. Sometimes the claimant had to show that he "would be"[14] persecuted. In other cases, he had to prove a "clear probability"[15] or a "likelihood"[16] of persecution.

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[14] *Hosseinmardi* v. *INS*, 405 F.2d 25, 28 (9th Cir. 1968).

[15] *Lena* v. *INS*, 379 F.2d 536, 538 (7th Cir. 1967); *Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2nd Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Rosa* v. *INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Cisternas-Estay* v. *INS*, 531 F.2d 155, 159 (3rd Cir. 1976).

[16] *McMullen* v. *INS*, 658 F.2d 1312 (9th Cir. 1981).

Despite these different formulations of the standard, an analysis of the cases reveals a common thread. The courts have consistently rejected claims which relied solely on the naked assertion of fear. Generally, the courts have required some objective evidence which lends credence to an applicant's subjective fear of persecution in order to demonstrate that the applicant has a bona fide and reasonable basis to fear persecution.

Thus in *Moghanian* v. *U.S. Department of Justice*, 577 F.2d 141 (9th Cir. 1978), the court refused to reverse the denial of a §243(h) application because the only evidence of a fear of persecution he presented was "his undocumented claim that when he was a child other children were rude to him and that as a member of a religious minority he is apprehensive of ill treatment in his native land." 577 F.2d at 142.

In *Pereira-Diaz* v. *INS*, 551 F.2d 1149 (9th Cir. 1977) the court reached a similar conclusion because the petitioner had presented "essentially undocumented statements of belief" that he would be persecuted by communists in Portugal. 551 F.2d at 1154. See also *Gena* v. *INS*, 424 F.2d 227, 233 (5th Cir. 1970).

And in *Khalil* v. *District Director of INS*, 457 F.2d 1276 (9th Cir. 1972), the evidence consisted only of statements by the applicant and a witness asserting their belief without more that the applicant would be persecuted. The denial of her application too was affirmed.

In other words, in none of the foregoing cases did the claimant present any objective evidence to support his asserted fear of persecution. In this respect, *Khalil* is instructive. Said the court:

> No factual support which might have demonstrated the *reasonableness* of this belief was offered; hence the INS was not clearly wrong in discounting the conclusory statements of danger and determining that Khalil had failed to sustain her burden of proof. 457 F.2d at 1278. (emphasis added)

The lesson is plain. If Khalil had presented reasonable and objective evidence to support her fear of persecution, the outcome

might have been different. None of the foregoing cases, or any of the judicial decisions which have used the term "clear probability," have required an individual to produce evidence that he would be "singled out" for persecution in the sense that he has already come to the attention of potential persecutors. These courts have only been looking for some objective evidence to corroborate the applicant's subjective fear in order to determine if the applicant had a "well-founded" or reasonable fear of persecution.

III. The Board's Characterization of the Burden of Proof as Requiring a Clear Probability of Persecution Has Led Immigration Officers To Require More Than Proof of a Reasonable Fear of Persecution.

Immigration officers have been given precious few guidelines on which to make their asylum determinations, and the indiscriminate use of terms like "clear probability" or "singling out" only add to their confusion. These officers give the words "clear probability" their ordinary meaning. To them, as it would to most people, the label "clear probability" means the applicant must clearly and definitely establish that he or she is probably going to be persecuted. This is plainly more than proving a reasonable fear of persecution which is all the U.N. Protocol, and presumably U.S. law, was meant to require.

The label "clear probability" misleads officers by focusing their attention exclusively on a need for highly individualized objective proof, and ignores the subjective component of the "well-founded fear" analysis which, according to the *U.N. Handbook*, is an important element in the evaluation of an asylum claim. It also approaches a degree of certainty which is impossible to demonstrate in all but a few cases.

Immigration officers have described their dilemma in applying the appropriate burden of proof in the following way:

> "We can't make a decision solely from the evidence presented because most people can't meet the strict stan-

dards . . . I never ask a person anything. I just look and see if the person belongs to a nationality group that everyone agrees are refugees like the Poles."

—INS examiner, INS Asylum Study, p. 53

"The 'clear probability' standard in my estimation is too high a standard, both in theory and in practice. In theory, it comes too close to 'beyond a reasonable doubt.' In practice, it means that unless you can present *Time* magazine articles on your own treatment, or State or the CIA has taken you under their wing, you may as well hang it up."

—INS attorney, INS Asylum Study, p. 53

Admittedly, the "clear probability" standard is extremely difficult to meet. "If we used that all the time," said a district director, "no one would be given asylum."

INS Asylum Study, p. 54.

Obviously, if immigration officers are equating the "clear probability" standard with the "reasonable doubt" standard of criminal law, they can hardly be applying a "well-founded fear" standard which asks them to decide only whether the evidence establishes a reasonable and credible fear of persecution.

The problem is readily acknowledged in the internal "INS Asylum Study":

What is an appropriate evidentiary standard for deciding an asylum claim? The Service requires that there be a "clear probability." At present, there are few guidelines to enable examiners to apply the standard uniformly in each district, sometimes resulting in one district or officer rejecting a claim that another officer or district would accept. In one instance, the brother was granted asylum; the sister was denied. Both applications, and the proof presented, were almost identical.

INS Asylum Study, p. 54.

As noted earlier, while the Solicitor General understands that a close and careful analysis of the cases may support his view that a "clear probability" and "well-founded fear" boil down to the same thing, that is not the way ordinary immigration officers understand these terms. In their eyes, there is a distinct difference between the two formulations. And because they see the "clear probability" standard as imposing a more arduous burden than the U.N. Protocol's "well-founded fear" standard, clarification by this Court is essential.

Conclusion

Both the U.N. Protocol and the Refugee Act of 1980 require an asylum applicant to demonstrate a "well-founded fear" of persecution. The language of the statute itself is appropriate to describe the burden of proof. The continued usage of terms like a "clear probability," etc., has only contributed to confusion and uncertainty regarding the meaning of the law.

It is submitted that if an applicant comes forward with objective evidence which gives credence to his own personal fear of persecution, he has met his burden. In other words, an applicant must show good reason why he fears persecution, thus giving meaning to all three words of the phrase "well-founded fear."

By requiring an individual to prove a "clear probability" of being "singled out" for persecution, the Board of Immigration Appeals has created an impermissibly strenuous burden for refugees to bear. This heavy burden frustrates Congress' purpose in enacting the Refugee Act of 1980, and it has proven to be virtually impossible to meet for many asylum seekers with bona fide fears of persecution.

Only this Court, it would seem, can provide immigration officers with the guidelines they obviously need to act upon asylum applications in a fair and reasonable way. As noted frequently in this brief, labels other than "well-founded fear" tend to mislead

the officers to require proof of more than a reasonable fear of persecution when they should be looking only for credible evidence that the applicant's fear of persecution is real and reasonable.

Although the views expressed here differ somewhat from the court below, we believe the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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National Immigration Project of the National Lawyers Guild, Inc.

ADDENDUM

Appendix A

The twenty-one organizations described below join in this brief to advocate the affirmance of the well-founded fear standard in political asylum cases. The diversity of these groups reflects the broad-based commitment to bring United States law into full compliance with the United Nations Protocol Relating to the Status of Refugees.

The AMERICAN FRIENDS SERVICE COMMITTEE, NEW ENGLAND REGIONAL OFFICE, maintains a Refugee Program which assists Central American and Haitian women living in Boston to address the health, parenting, family and employment issues affecting their lives.

The ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF) is a non-profit corporation established in 1974 under the laws of the States of California and New York. It was formed to protect the civil rights of Asian Americans throughout the nation through the prosecution of lawsuits and the dissemination of public information.

The ASIAN LAW CAUCUS, INC., is a community law organization serving the Bay Area since 1972 with offices in Oakland and San Francisco Chinatown. The Caucus has represented immigrants over the last 11 years, and currently represents individuals seeking political asylum in the United States.

The BAY AREA IMMIGRANT AND REFUGEE RIGHTS PROJECT is a special project of the San Francisco Lawyers' Committee for Urban Affairs. The Lawyers' Committee is the Northern California affiliate of the national Lawyers' Committee for Civil Rights Under Law. The Immigrant and Refugee Rights Project is involved extensively with the recruitment and train-

ing of attorneys willing to provide *pro bono* representation to political asylum applicants. The Project is dedicated to ensuring through domestic and international laws that the rights of persons seeking asylum are protected.

The CENTER FOR IMMIGRANTS' RIGHTS (CIR) is a legal and educational organization working with New York's immigrant communities. In particular, it has a special project which provides both direct representation and legislative advocacy on behalf of Central American refugees.

The CENTRAL AMERICAN REFUGEE CENTER (CARECEN) provides emergency immigration assistance to Central American refugees in the Washington, D.C. area. A non-profit organization founded in 1981, CARECEN has a current caseload of over 500 asylum cases.

The CENTRAL AMERICAN REFUGEE DEFENSE FUND (CARDF) grew out of test case litigation which is still being conducted on behalf of Salvadoran refugees. Founded in 1981 by co-directors Marc Van Der Hout and Carolyn Patty Blum, CARDF also coordinates a legal network of Central American refugee defense practitioners.

The CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA (CRTFCA) is an inter-faith organization composed of over 300 Chicago-area residents and a variety of human rights and religious organizations. Founded in January 1981 to organize people of all religious persuasions to respond to the suffering poor of Central America, CRTFCA has as one of its major goals the attainment of legal status for Salvadoran and Guatemalan refugees in the United States.

EL RESCATE is a refugee relief project designed to provide legal, social and educational assistance to displaced persons from Central America residing in the United States, and primarily in Southern California.

The EL SALVADOR LAWYERS COMMITTEE OF DENVER represents Salvadorans seeking political asylum before the Immigration and Naturalization Service on a *pro bono* basis. It is of extreme importance to their legal representation that a proper and realistic burden of proof be established for the courts to follow.

The HAITIAN REFUGEE CENTER (HRC) in Miami is run by and for the benefit of Haitian refugees who seek asylum in the United States. HRC has successfully protected the Constitutional, statutory and international law rights of Haitian refugees through federal class action litigation. In addition, it provides indigent Haitian refugees with food, clothing, shelter, education and hope.

The JUSTICE AND PEACE OFFICE OF THE ARCHDIOCESE OF DENVER works weekly with Salvadoran refugees in the Denver area. Its knowledge of the violence the refugees flee and the inhumane difficulty they usually encounter regarding the standard of proof in asylum cases has induced it to join this brief.

LA RAZA LEGAL ALLIANCE is an organization of lawyers, legal workers and law students intended to defend the cultural and legal rights of Latinos within the United States. Its involvement in the litigation on behalf of undocumented alien school children reflects its historical interest in the rights of the undocumented.

LUTHERAN IMMIGRATION AND REFUGEE SERVICE OF THE LUTHERAN COUNCIL IN THE UNITED STATES OF AMERICA is a non-profit agency of the Lutheran church that has for 35 years served refugees, immigrants and undocumented persons through counseling, resettlement, advocacy and education. A significant number of persons served through the efforts of Lutheran Immigration and Refugee Service have been, are being or will be significantly effected by standards set to determine eligibility for refugee or asylee status.

The MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF) is a national civil rights organization dedicated to preserving the Constitutional and civil rights of

persons of Mexican and Hispanic descent, including those who are undocumented.

The NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC. in Los Angeles is a non-profit organization dedicated to the protection and promotion of the rights of immigrants and refugees in the United States. The Center has served as counsel in many significant federal cases concerning the rights of refugees, and provides direct assistance to indigent refugees in need of representation. Because the Center represents thousands of refugees who are seeking asylum in the United States, it has a direct interest in the standard used for evaluating asylum claims.

The NATIONAL MINISTRIES is one of the four principal national agencies of the AMERICAN BAPTIST CHURCHES IN THE U.S.A. which represents over 6000 congregations in this country. It has, since 1948, been involved in the resettlement of refugees and has sponsored 55,480 refugees as of May 31, 1983. The principles involved in *Immigration and Naturalization Service* v. *Stevic* are central to the National Ministries' mission of providing assistance to refugees and protection of their rights.

The SALVADORAN REFUGEE COALITION OF DENVER is composed of religious and lay persons who provide support and community assistance to Salvadoran refugees.

The TUCSON ECUMENICAL COUNCIL TASK FORCE FOR CENTRAL AMERICA provides legal aid and social services for thousands of Central American refugees who live in, or pass through, southern Arizona. It currently represents 1,600 asylum applicants, not one of whom has been granted political asylum.

The UNITARIAN UNIVERSALIST SERVICE COMMITTEE (UUSC) in Boston is a non-sectarian, non-profit organization founded in 1939 and dedicated to promoting economic, social, civil and political rights of people throughout the world. UUSC's relief programs assist refugees throughout Central America as well as support efforts to obtain extended voluntary departure status for Salvadorans and Guatemalans already in this country.

The WASHINGTON ASSOCIATION OF CHURCHES is a statewide ecumenical organization in Washington state. It has a long history of immigration and refugee concerns. The issues raised in *Immigration and Naturalization Service* v. *Stevic* are of special interest to it in terms of its newly organized program to respond to the social service needs of Salvadoran and Guatemalan refugees in Washington.

The WILLIAMETTE VALLEY IMMIGRATION PROJECT in Woodburn, Oregon, is a non-profit community-based organization active in legal defense for Spanish-speaking non-U.S. citizens with immigration problems. The organization and staff have been certified under 8 CFR §292 to conduct representation in immigration matters as non-attorneys since July 1, 1977. Its interest in the *Stevic* case stems from its involvement in legal defense of asylum applicants from Central America. Adoption by the Court of the well-founded fear standard of proof for persecution claims is vital to the future safety of its Central American clients.

APPENDIX B

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

WASHINGTON LIAISON OFFICE

1785 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20036

[SEAL]

HAUT COMMISSARIAT
DES NATIONS UNIES
POUR LES REFUGIES

DELEGATION A WASHINGTON

TELEPHONE: (202) 387-8546

January, 1982

Dear

We have, in recent months, received numerous requests from or on the behalf of Salvadoran, Haitian and other asylum seekers for advisory opinions as to their eligibility for refugee status under the provisions of the United Nations Convention/Protocol on the Status of Refugees. Those which we have favorably reviewed, we have issued a "mandate certificate" to the effect that the individual concerned, on the basis of the information available, is considered to be a refugee under the mandate of the Office of the United Nations High Commissioner for Refugees.

This is to advise you that it has been decided recently that the practice of issuing mandate certificates by this office would cease *except in the following instances: (a) asylum claimants in detention and facing the imminent threat of refoulement; and (b) appeals against initial negative decisions.* The primary considerations for this change in practice as far as the U.S. is concerned were as follows:

a. Since the U.S. is a party to the protocol and has established a formal procedure for the determination of asylum status, UNHCR feels that it is neither productive nor constructive to conduct what in effect would amount to a parallel asylum determination procedure by the United Nations. UNHCR will instead continue to seek a formal role of advisory character under the proposed new U.S. asylum eligibility procedure.
b. UNHCR does not presently have the capacity or resources—human and material—to handle effectively the

numerous requests for advisory opinions as to possible eligibility. For instance, besides the Chief of the Office, there are only two other professional officers—the Legal Officer and the Information Officer, in the Washington Liaison Office.

c. As UNHCR has no opportunity to interview directly most of the individual cases that have been referred to this office, we are hardly in a position to engage in a fact-establishing process and to make any assessment as to the credibility of the asylum applicant's statements. In this situation we feel that the best we can do is to offer some general but practical guidance, based on the office's accumulated experience in the international legal protection of refugees. That is why UNHCR has made available, at a reasonable cost, copies of its *Handbook on Procedures and Criteria for Determining Refugee Status*, (hereinafter referred to as the *Handbook*) to lawyers, groups and individuals concerned with refugee problems, although it was originally intended for the guidance of government officials. The Office remains, needless to say, ready and willing to offer guidance in those issues that are neither covered nor adequately dealt with in the *Handbook*.

May we take this opportunity also to elaborate further on the position of UNHCR on certain legal issues pertaining to the protection of refugees in general and to the situation of Salvadoran asylum seekers in particular.

A. *"Prima Facie" Refugee/Asylum Status*

"Prima Facie" determination of refugee status is usually not resorted to under the 1951 Convention and the 1967 Protocol since most States that have adhered to either instrument have established procedures to decide on individual applications. The "prima facie" construction has, however, sometimes been used by UNHCR when determining mandate status on an *ad hoc* basis in cases of sudden, large scale

influx, or where it was otherwise impractical to determine the status of asylum-seekers individually. (See paragraph 44 of the UNHCR *Handbook*). Broadly speaking, such a determination is theoretically based on (1) the existence of an *objective situation* in the country of origin, i.e. the element of persecution, and (2) a presumption that the *subjective element*, i.e., fear of persecution, is also present; with the result that the persons concerned are deemed to be refugees under the mandate of UNHCR as defined in its Statute. They are therefore considered as entitled, both as a group and as individuals, to UNHCR protection.

B. *Role of UNHCR in refugee/asylum determination process*

UNHCR was established by the U.N. General Assembly in resolution 319 (IV)3 of 1949. This was followed a year later by another G.A. resolution, Resolution 428 (V), which expressly called upon governments to cooperate with the Office of UNHCR in the performance of functions which are set out in the Statute, annexed to that resolution. The primary function of the Office, as defined under its Statute, is to extend international protection to refugees who by definition are, at least temporarily, unable or unwilling to enjoy the diplomatic protection of their former homeland. In this role the UNHCR, which acts as the refugees' "ambassador" in the countries of asylum, seeks among other things to ensure first and foremost that no one, for whatever reason, including *illegal* entry, is forcibly returned to a country where he/she may have reason to fear persecution, (that is, all nations must scrupulously uphold the cardinal principle of *non-refoulement*), and secondly, that persons claiming to be refugees are expeditiously identified as such and are granted a favorable legal status in their country of asylum. The legal rights of refugees/asylees, above and beyond those they are entitled to as individual human beings, have been identified and defined under the 1951 Convention and the 1967 Protocol relating to the status of refugees. These instru-

ments define not only the rights but also the duties of refugees, and contain provisions relating to a variety of issues: for example, the right to family unification, employment authorization, education and welfare assistance.

We should emphasize that the protection role of UNHCR is not conditional upon prior government consent. The UNHCR will intervene to protect refugees' legal rights if it receives complaints that they are being violated and, with respect to States party to international instruments, the UNHCR has a responsibility to supervise their actual application. The legal basis of UNHCR's protection role can specifically be found in para. 8(a) of the Statute read together with para. 6 of the Preamble and Art. 35 of the 1951 Convention, as well as Article II of the 1967 Protocol. Those provisions, on the one hand, entrust the High Commissioner with the responsibility of supervising the implementation of the provisions of the international refugee instruments in the territory of each contracting State, and, on the other hand, oblige States party to either of those instruments to cooperate with the Office in the exercise of its supervisory role. Article 35 of the Convention, for example provides:

> "(1) The Contracting States undertake to cooperate with the Office of UNHCR—in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

UNHCR, of course, recognizes that there is no one model asylum procedure that should be adopted universally, and it is therefore the sovereign right of each State party to establish the procedure that it considers most appropriate in the light of its own particular constitutional, judicial and administrative structure.

It has been internationally recognized, however, that every such determination procedure ideally should meet certain

basic and minimal requirements in order to ensure fairness and effectiveness. Specifically, at the General Assembly's 28th session in 1977, in a major meeting on international protection at which the U.S. was represented, it was recommended that procedures for determining refugee status fulfill at least seven basic requirements. These recommendations stress: early identification of claimants at frontiers (such as airports); provision of guidance to the claimant as to the procedure to be followed, as well as necessary facilities to make his claim, including competent interpretation and access to counsel. It was also recommended that a clearly identified authority be responsible for examining requests for refugee status and for making decision in the first instance. Further, there should be the possibility to appeal for formal reconsideration of negative decisions, and the right to remain in a country pending appeal outcomes. It was recommended additionally that States party give favorable consideration to UNHCR formal participation in the process. Such recommendations of course have no binding force in international law, but can be used persuasively vis-a-vis governments which are members of the Executive Committee and have voted for such a recommendation.

C. *Definitions of Persons of Concern to UNHCR*

Persons fulfilling the definition of the term "refugee" under Chapter II of the Statute of the UNHCR, fall within our competence. This covers, for example:

> "Any person who—owing to well-founded fear of being persecuted *for reasons of race, religion, nationality or political opinion*, is outside the country of his nationality and is unable or, owing to such fear or for reasons *other than personal convenience*, is unwilling to avail himself of the protection of that country. . ." [emphasis ours].

The refugee definition in the Statute is thus essentially the same as which figures in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, although it makes no reference to the criterion of "membership of a particular social group." Needless to say, persons who are recognized "Convention/Protocol refugees" also fall under the mandate of the Office. So do *bona-fide* asylum seekers who have not yet gained formal recognition as refugees by the country of refuge. (See p. 6 below.)

The scope of UNHCR's mandate has since been gradually extended by various UN General Assembly resolutions so that UNHCR may also provide international protection to externally displaced persons if these find themselves in a *refugee-like* situation due to events (sometimes referred to as "man-made disasters) arising in their country of origin. The Office's concern for externally displaced persons has found strong legal affirmation in Africa where the Refugee Convention of the Organization of African Unity contains a widened definition of the term "refugee" which embodies the notion of externally displaced persons:

> "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin, nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (Art. 1, para. 2.)

In summary, persons within the mandate of UNHCR include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds, but also those of the large group of categories of persons who can be determined or presumed to be without, or unwilling to avail themselves of, the protec-

tion of their country of origin because of certain objective factors occurring there. Such persons, in particular, should under no circumstances be obliged, directly or indirectly, to return to their home country as long as the civil strife continues and as long as their fear of such violence remains well-founded.

It is important to emphasize that the extension of the scope of the protection mandate of UNHCR has not emanated from UNHCR itself but from the member states of the United Nations (including the U.S.) which adopted the said resolutions.

D. *Comments on Certain Aspects of the Definition of the term "Refugee"*

The *Handbook* deals with most of the issues mentioned below. Our present comments are simply in elaboration of what is contained therein.

a. *Burden of Proof*—The granting of asylum is a legal as well as a humanitarian act and since decisions on asylum may well decide the life or death of a person, UNHCR strongly holds that a high standard of fairness is essential in any asylum determination process. Thus, while in principle, the burden of establishing a valid claim rests with the individual claimant, unless there is reason to the contrary to doubt the credibility of a claimant, the benefit of the doubt should always be given to him even in the absence of other corroborative evidence. In UNHCR's view, therefore, the "balance of probabilities" standard is rather strict since any doubt should be resolved in favor of the claimant.

b. *Application of the "Refugee" Definition*—UNHCR advocates a liberal interpretation and application of the refugee definition in consonance with the fundamental humanitarian character of the institution of asylum. A narrow and rigidly legalistic application of

the definition would inevitably leave a large number of *bonafide* asylum seekers without refuge and would subvert the spirit of the Convention and/or Protocol. Immigration considerations, in particular, must not be brought to bear on the application of the refugee definition. The possibility for instance that, if one person were given asylum status, many others might also be entitled to claim asylum status is not a relevant consideration as to whether the asylum claim is a valid one. Moreover, any assumption of an abuse of procedures in order to gain entry into a country should not be allowed to weigh negatively in a judgment on the merits of specific asylum applications; such a posture would lead inevitably to a subversion of the spirit of national commitments to the Convention and Protocol.

c. *Fear of Persecution*—Refugees are generated by conditions, political in the broadest sense, which render continued residence intolerable or impossible. Concerned as it must be with events which have not yet occurred, the refugee definition relates to with possibilities and probabilities rather than certainties. While past persecution is evidence to substantiate a well-founded fear, it need not be the only evidence. What has happened to others in similar circumstances, for instance, may be sufficient evidence of a well-founded fear of persecution. Where measures of persecution are found to be directed against a group of persons which have common characteristics, such measures must as a rule be considered to be directed against every member of the persecuted group. And a person who has not been persecuted simply because he has not yet attracted the attention of his government, need not wait until detection and persecution before he can claim refugee status. Nor need he be under the threat of imminent

persecution. Moreover, a person need not be singled out for persecution in order to be a refugee; each claim however, must be assessed individually and once that takes place, it ought not to be rejected simply because a large number of others could also legitimately fear the same persecution.

d. *Forms of Persecution*—The categories of persecution are not finite and, depending on circumstances may comprise of such overt measures as threats to life and liberty, e.g., execution, detention, torture, etc., but may consist of less overt measures such as the imposition of severe economic disadvantage or the denial of access to employment or to education. In UNHCR's view, persecution may also take the form of indiscriminate terror. Persons may be persecuted and harassed for no apparent cause at all, other than for the purpose of instilling fear and terrorising them into political submission. Persons with a well-founded fear of becoming victims of government-supported terrorist tactics are refugees under the terms of both the Statute and the U.N. Convention/Protocol on the Status of Refugees. These may include those who may have been totally inactive politically and have not articulated any political opinions of their own. For the phrase "well-founded fear of persecution by reason of political opinion" does not mean only the political opinion of the asylum claimant, it also means what is imputed to be the political opinion of the particular claimant, or those in the particular social group to which he belongs, by the authorities of the country from which the claimant has fled. Persecution may also be periodic. It need not be continuous. As long as the pattern of periodic arrests and of harassment can be expected to continue, persecution will be established.

* * * * * *

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

WASHINGTON LIAISON OFFICE

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[SEAL]

HAUT COMMISSARIAT
DES NATIONS UNIES
POUR LES REFUGIES

DELEGATION A WASHINGTON

TELEPHONE: (202) 387-8546

Mr. K. Steinberg
Simmons and Ungar
517 Washington Street, Suite 301
San Francisco, California 94111

April 15, 1982

Dear Mr. Steinberg;

With reference to the letter we sent you early this year concerning, among other things, the UNHCR mandate and the definition of refugee as well as the situation of Salvadoran asylum seekers, two corrections should be noted:

i. at page four paragraph D. a. "Burden of Proof"—the last sentence should read:

> "In UNHCR's view, therefore, *the clear probability standard* is rather strict since any doubt should always be resolved in favor of the claimant."

ii. at page seven, paragraph F. "Conclusions of the Executive Committee on the Protection of Asylum Seekers in Situations of Large-Scale Influx", the first sentence should read as follows:

> "At its 32nd Session (20 October 1981) the Executive Committee, of which the United States is a member, unanimously adopted the following recommendations with regard to protection of asylum seekers in situations of large-scale influx: . . ."

We apologize for any inconvenience that may have been caused by these errors.

Sincerely,

United Nations High Commissioner
for Refugees
Washington Liaison Office